

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

KENNETH DE'MARIO AVERY

PETITIONER

V.

CIVIL ACTION NO.3:12CV56-GHD-DAS

CHRISTOPHER EPPS, et al.

RESPONDENTS

REPORT AND RECOMMENDATION

The respondents have moved to dismiss this habeas petition for failure to exhaust state court remedies. The petitioner has filed no response to the motion.

Avery does not challenge his conviction and sentence in this action, but does challenge the accuracy of the calculation of his sentence by the Mississippi Department of Corrections. He instituted the ARP proceedings within MDOC. In order to exhaust his state court remedies, Avery must appeal any unfavorable administrative decision first to the state trial court. He must then pursue his appeals through the Mississippi Supreme Court. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Avery has not done so and therefore cannot proceed with his petition at this time.

The undersigned recommends that this petition be dismissed without prejudice.

The parties are referred to 28 U.S.C. § 636(b)(1) and Local Rule 72(a)(3) for the appropriate procedure in the event any party desires to file objections to these findings and recommendations. Objections must be in writing and must be filed within fourteen days of this date. Failure to timely file objections to the proposed findings and recommendations will bar an aggrieved party from challenging on appeal both the proposed factual findings and the proposed legal conclusions that are accepted by the district court. *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

Petitioner is directed to acknowledge receipt of this report and recommendation by signing the enclosed acknowledgment form and returning it to the court within fourteen days of this date. Petitioner is warned that failure to comply with the requirements of this paragraph may lead to the dismissal of this lawsuit under F.R.Civ.P. 41(b) for failure to prosecute and for failure to comply with an order of the court.

This the 14th day of December, 2012.

/s/ David A. Sanders
UNITED STATES MAGISTRATE JUDGE